to the Assistant Official Assignee is untenable and must be rejected.

Appeal dismissed.

Solicitors for appellant—*Wreford & Thornton.*

[ORIGINAL CIVIL JURISDICTION]

MANNING, J.

November 21, 1939.

ABDUL WAHAB BIN ABDUL RAUF AND ANOTHER

v.

HAJI WAHAB BIN HAJI MOHAMED AND ANOTHER.

[MALACCA SUIT No. 159 of 1938]

Trustee selling to himself and another—Breach of trust.

If a trustee for sale of one estate sells part of the estate property to himself and another as trustees of another estate this transaction is usually bound to be under the same suspicion of favouritism as if he were selling to himself personally and any person interested in the trust property is entitled to ask the Court that such conveyance should be set aside as a breach of trust.

TRIAL.

S. C. Goho for plaintiffs.

W. F. Zehnder for defendants.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

Manning, J.—One Haji Maimunah binte Haji Abdul Wahab (hereinafter referred to as Maimunah) died on the 19th February 1921. She had made a will on 21st January 1921. She appointed as her executor one Haji Mohamed bin Haji Abdulrahman (hereinafter referred to as Haji Mohamed). He died on March 24th 1938, leaving a will by which he appointed one Haji Wahab bin Haji Mohamed, the 1st defendant in this action, as his executor.

By clause 2 of her will Maimunah devised to her two grandchildren "the house at Klebang Kechil in which I live, together with the land on which this house stands". These two grandchildren are the plaintiffs in this action.

On the 8th December 1919 Haji Mohamed and the 2nd defendant Nyonia binte Ali became trustees of a certain religious trust under the will of one Haji Abdul Raman. As such trustees they bought certain land from Haji Mohamed as executor of the estate of Maimunah. It is in connection with this sale that the first point in this action arises. The plaintiffs ask that this conveyance be set aside. They say it was a case of a trustee himself buying trust property, i.e. Haji Mohamed selling to himself property which he held as executor of Maimunah. They say such a sale is void and that a Court, without even inquiring into the circumstances, will set aside on its being brought to its notice.

Mr. Zehnder, for the defendants, in his final argument contented himself with arguing that the plaintiffs have no right to take proceedings to set aside this sale. The plaintiffs, he says, were merely interested in the house at Klebang Kechil, customary land which could not be devised by will. The conveyance which is sought to be set aside concerns a different piece of land. The only persons interested in this latter land are the other beneficiaries under the will of Maimunah, namely, her two sons, and they have signed a document relieving Haji Mohamed from all liability.

I am unable to agree with this argument of Mr. Zehnder's. The house and land at Klebang Kechil were devised to the plaintiffs. It may be that under the law this was a mere nugatory devise. I do not think this is a point I have to decide in this action. I assume that they were beneficiaries to some extent under the will of Maimunah. As a matter of fact they never received anything under the will; the house and land at Klebang Kechil had been mortgaged and were sold on the instructions of the mortgagee for $10,700. This amount was credited to the estate by Haji Mohamed, but no part of it was paid to the plaintiffs, the assets being insufficient for that purpose. I feel bound to assume that the plaintiffs were interested in there being a sufficiency of assets. If, therefore, there had been a breach of trust which might have had the effect of reducing the assets, the plaintiffs are entitled to come to the Court to challenge that breach of trust and to ask that any conveyance in breach of trust should be set aside.

In the course of the hearing Mr. Zehnder admitted that, if a trustee sells trust property to himself, such a sale must be set aside. But this he said, is a different case, the trustee is not selling trust property to himself, he is selling it to the trustees of another estate, who happened to be himself and another person. Mr. Goho, for the plaintiffs, cited numerous authorities, but none of them cover the

point raised by Mr. Zehnder. The principle laid down in these authorities is based on the conflict of interest which arises when a trustee occupies the two positions of vendor and purchaser. I see the same conflict of interest even if the trustee of the estate sells the trust property to himself as the trustee of another estate. The transaction is open to the same suspicion of favouritism as if he were selling to himself personally. For this reason I was unable to accept the distinction made by Mr. Zehnder.

Another point made by Mr. Zehnder was this. The second defendant was a trustee of the religious trust to which the property was sold. She was not a trustee of the property which was sold. She has been made a defendant on the ground that she connived at the breach of trust. I think it was necessary in any case that she should have been made a defendant, the land was sold to her as trustee with another, and she had to be made a party to any action to set aside that sale. There is no evidence that she connived at the breach of trust. Mr. Zehnder says she should not have been made a defendant in her personal capacity, but in her capacity as trustee, it was in that capacity she became the purchaser. I am in agreement with him there, but his success in this contention cannot affect the result of these proceedings except as regards costs, and I order an amendment by adding to her name, "trustees of a certain trust under the will of Haji Abdul Raman bin Abdul Latif".

The plaintiffs further seek for an account on the footing of wilful default. In support of their claim they allege the breach of trust with which I have already dealt. They also allege a mistake in the accounts submitted by Haji Mohamed. The facts are as follows: The property at Klebang Kechil already referred to was registered in the name of Abdul Rauf, a son of Maimunah. On the materials before me I have no doubt that it was actually the property of Maimunah. Haji Mohamed had no doubt of this either, for in his affidavit for the Commissioner of Stamps he entered it in the list of immovable properties belonging to Maimunah and valued it at $15,000. Abdul Rauf, had, however, before the death of Maimunah, taken advantage of fact that the property was registered in his name and on the security of the property had borrowed a sum of $10,000. There is no doubt that this was a personal debt due by Abdul Rauf, and not a debt due by Maimunah. Haji Mohamed was aware of this also, for in the affidavit for the Commissioner of Stamps already referred to he did not enter it as a debt due by Maimunah or as a charge on the property at Klebang Kechil. Yet in the accounts submitted by Haji Mohamed this $10,000 is treated as a debt due by Maimunah and it and interest thereon were paid out of her estate. Haji Mohamed is now dead, and his executor, the 1st defendant, did not give evidence. There is a prima facie case of a very careless mistake, and though, owing to the circumstances, it may not at this stage make any considerable difference, it and the breach of trust entitle the plaintiffs to the relief they seek.

The plaintiffs succeed on their claims (a), (b), (c) and (d). They will have their costs of this action against the first defendant, to be paid out of the estate of Haji Mohamed, such costs to be taxed as between solicitor and client. There will be no order for costs against the 2nd defendant.

Order accordingly.

Solicitors for plaintiff:—*Rogers & Son.*

Solicitors for defendants:—*Zehnder Bros.*